SPECIFIC PERFORMANCE—CONTRACT FOR SALE OF LAND—DEFAULT OF VENDEE IN MAKING PAYMENTS.—Defendant contracted to sell land for $100 down and $1,300 to be paid at his bank on Nov. 1. The agreement contained a clause providing for the forfeiture of the prior payment and all rights in the land in case of failure to pay the $1,300 on the day named. Vendee, instead of paying cash, delivered to the cashier of the defendant's bank a sight draft drawn on his own bank and certified over the telephone. This draft was accepted by the cashier as payment although he had no express authority to do so. Conveyance having been refused, vendee prays specific performance. *Held,* not having complied with the conditions precedent, vendee is not entitled to relief in equity. *Keller* v. *Garneaux,* (S. D., 1921), 180 N. W. 779.

A number of our courts construe literally the forfeiture terms of a contract for the sale of land. They consider that such provisions make time the essence of the contract, and regard a failure to make payments promptly in the face of such provisions as a failure in the performance of conditions precedent. They argue that "a court of equity has no more right than a court of law to dispense with the express stipulations of the parties in regard to time in contracts of this nature where no fraud or mistake has intervened. To relieve from such stipulations except on the grounds named would practically deny the right of the parties to make them." *Heckard* v. *Sayre,* 34 Ill. 142. The California, Indiana, Iowa, Nebraska and Minnesota courts incline strongly toward this treatment of the forfeiture clause, and under the spell of these arguments a number of extremely harsh forfeitures have resulted. On the other hand, courts are not wanting to hold that time cannot be made the essence merely by so declaring, if it is unconscionable to allow it. In the striking language of the Michigan court equity will not "be ousted of its jurisdiction, or refuse to relieve against the exaction of the pound of flesh, although the parties have in express terms stipulated for it." *Richmond* v. *Robinson,* 12 Mich. 193. This is not a novel doctrine in the field of equity jurisprudence. On the contrary it finds a close counterpart in the treatment accorded the provisions of the mortgage. In each case the court of equity looks with disfavor upon the forfeiture. Yet the analogy is not quite complete because the right of the mortgagor to redeem has become a matter of course, whereas the right of the vendee to be relieved of the stipulated forfeiture and to compel a specific performance is still held within the discretion of the court. The turn which this discretionary power may take in a given case is governed largely by the relative weight of a number of conflicting considerations. If the sum to be forfeited is large compared with the hardship on the vendor, if the vendee has been granted possession and has made improvements, if he has been prevented from paying on time by circumstances beyond his control, and particularly if he has been prevented by the acts of the vendor, or if the vendor has waived the condition of payment,—all these are potent reasons for ignoring the stipulations of forfeiture. On the other hand if the vendee has been negligent, or if the vendor has particular need for the money on the day named, or if the property has increased in value since default—these are possible considerations which in

the discretion of the court may defeat the vendee's bill. See authorities collected in WILLISTON ON CONTRACTS, Vol. II, Sec. 791. In regard to the principal case, since the South Dakota court has not hitherto committed itself to a policy of strict construction, this discretionary power might well have been exercised in favor of the vendee. The sum forfeited was not large, it is true, but he had acted in good faith, payment had been made in a form reasonably common in business dealings, and there was no evidence of fluctuating land value or other undue hardship on the vendor. The case may well be contrasted with *Compton* v. *Weber,* (Ill., 1921), 129 N. E. 764, a recent Illinois case, in which a vendor to whom $3,000 of a $25,000 purchase price had been paid, refused to accept a check in payment of the balance, although that form of payment had been accepted for the prior installment, and demanded legal tender at so late an hour that he well knew it could not be procured. The Illinois court, although committed to the doctrine of strict construction, refused to countenance what it termed "a sharp business trick" by the vendor, especially since the latter had, by accepting a check for the prior payment, led the vendee to believe that the same form of payment would be accepted again. In the Illinois case the sum which would have been forfeited was greater but on principle it would seem that the principal case should reach the same result.

STATUTORY CONSTRUCTION—U. S. MAIL BOX NOT A "POST OFFICE," "BRANCH POST OFFICE," OR "POST OFFICE STATION."—A copy of a summons, complaint, affidavits, and order for publication which had been sealed up in an envelope directed to defendant, a foreign corporation, were deposited in a letter box maintained by the United States government in an office building. A statute authorized the order of publication for constructive service to direct a mailing at "a post office," "branch post office," or "post office station." *Held,* defendant's motion to vacate and set aside the judgment should be granted because mailing the summons by placing it in a post office box did not comply with the requirements of the statute. *B. Berman, Inc.* v. *Amer. Fruit Distr. Co. of Calif.,* (N. Y., 1921), 186 N. Y. Supp. 376.

By looking at the code as a whole, the court concluded that the Legislature intended to allow the summons to be mailed only in the three sorts of places named. The term "letter box" was known to the legislators since they used it in a different connection as pointed out by the code itself in section 797. Consequently it seemed to the court that in the case of serving a summons the legislative intent that it could not be placed in a mail box was very clearly expressed. A similar method of statutory construction is found in *McArthur* v. *Moffett,* 143 Wis. 564.

TRIAL—INSTRUCTIONS AS TO DAMAGES.—The jury returned a verdict of $1,500,—the amount sued for,—where testimony had been introduced for but $597.90. The trial court instructed the jury that they should allow such damages as the preponderance of the evidence showed the plaintiffs to have sustained, not to exceed the sum of $1,500,—the damages named in the com-